No. 91-1671

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM J. MERTENS, ET AL., PETITIONERS

v.

HEWITT ASSOCIATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a nonfiduciary who knowingly participates in a breach of fiduciary duty under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, is liable for losses that an employee benefit plan sustains as a result of the breach.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of ERISA are reproduced in the Appendix, *infra*, 1a-3a.

STATEMENT

1. Petitioners are former employees of the Kaiser Steel Corporation (Kaiser) and participants in the Kaiser Steel Retirement Plan (the plan), a qualified pension plan under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*[1] In 1980, while respondent was serving as the plan's actuary, Kaiser began to phase out its steel-making operations. That action

[1] This case was decided on a motion to dismiss and therefore the allegations of petitioners' complaint are taken as true. Pet. App. A2, A19.

resulted in the early retirement of a greatly increased number of employees. Respondent, however, used actuarial assumptions that did not reflect the increased costs associated with the new developments. As a result, Kaiser did not adequately fund the plan, and plan assets became insufficient to satisfy benefit obligations. In October 1986, the Pension Benefit Guaranty Corporation (PBGC) determined that the plan was underfunded and incapable of paying its liabilities. The PBGC terminated the plan and began paying its participants substantially reduced benefits. Pet. App. A2-A3, A17-A18.

In December 1989, petitioners filed this action alleging that respondents violated ERISA and state malpractice law. Petitioners claimed that respondent had caused losses to the plan by allowing Kaiser to set actuarial assumptions, failing to disclose that it served as an actuary for both Kaiser and the plan, and failing to disclose the plan's funding inadequacies. Petitioners argued that respondent violated ERISA by breaching respondent's professional duties to the plan[2] and by participating in an unlawful party-in-interest transaction.[3] When respondent moved to dismiss the complaint for failure to plead causes

[2] ERISA imposes various requirements concerning actuarial services. See, *e.g.*, 29 U.S.C. 1023(d) (certain ERISA plan administrators must prepare annual reports including statements by enrolled actuaries), 1082(c)(3) (costs, liabilities, interest rates and other factors are to be calculated on the basis of "reasonable" actuarial assumptions that offer the actuary's "best estimate of anticipated experience under the plan"). Petitioners alleged that in providing actuarial services to the plan, respondent failed to comply with the obligations set forth in ERISA and implementing regulations. Br. in Opp. App. RA12.

[3] Section 406(a)(1)(C) of ERISA forbids various transactions between a plan and a "party in interest"—including the furnishing of services. 29 U.S.C. 1106(a)(1)(C). The statute defines the term "party in interest" to include a provider of services to a plan, 29 U.S.C. 1002(14), but exempts from the prohibitions of Section 406 any service contract for which "no more than reasonable compensation is paid." 29 U.S.C. 1108(b)(2). Petitioners claimed that respondent's fees were not "reasonable" because respondent's conflict of interest prevented it from providing adequate services to the plan. Br. in Opp. App. RA13.

of action cognizable under ERISA, petitioners advanced several legal theories: (1) that respondent was an ERISA fiduciary that breached its fiduciary duties; (2) that even if respondent was not a fiduciary, it was liable under ERISA for knowing participation in a breach of fiduciary duty; and (3) that respondent violated ERISA by breaching nonfiduciary duties imposed on an actuary by the statute. Pet. App. A2-A4.[4]

2. The district court dismissed petitioners' claims. Pet. App. A17-A30. The court found that respondent was not a fiduciary, because professional service providers such as actuaries, attorneys, and accountants do not act as fiduciaries when they perform ordinary services. *Id.* at A20-A22. The court dismissed petitioners' claim for monetary relief arising from respondent's alleged violation of its professional duties under ERISA. The court observed that Sections 502(a)(3) and (a)(5) of ERISA, 29 U.S.C. 1132(a)(3) and (a)(5) (App., *infra*, 1a-2a), expressly authorize an award of "equitable relief" against an actuary, but that petitioners did not allege facts entitling them to equitable relief such as restitution. Pet. App. A23-A25. The court also found that petitioners' "prohibited transaction" claim was merely an effort to recast the claimed breach of professional duty as a prohibited transaction. *Id.* at A25-A[illegible] Finally, the court dismissed petitioners' claim that E[illegible] created a right of recovery against respondent as a knowing participant in a fiduciary breach. The court relied on the Ninth Circuit's decision in *Nieto* v. *Ecker*, 845 F.2d 868 (1988), which held that ERISA does not create a cause of action for such claims against nonfiduciaries.[5] Pet. App. A22.

[4] In a related action, petitioners filed an ERISA claim against members of the Investment Committee of the Kaiser Steel Retirement Plan, alleging that they violated their fiduciary duties. *Mertens* v. *Black*, 948 F.2d 1105 (9th Cir. 1991) (upholding district court's refusal to dismiss on res judicata grounds claims against investment committee members).

[5] The district court also held that petitioners' pendent state-law claim for professional negligence was barred by the State's two-year statute of limitations. Pet. App. A26-A27.

3. The court of appeals affirmed the dismissal of petitioners' ERISA claims. Pet. App. A1-A13.[6] It agreed with the district court that respondent did not act as a plan fiduciary in providing actuarial services, *id.* at A5-A6, and that petitioners had not stated a proper claim for a breach of actuarial duties under ERISA, *id.* at A10-A11. Relying on *Nieto*, moreover, the court affirmed the ruling that a nonfiduciary such as respondent could not be held liable for knowing participation in a fiduciary breach. *Id.* at A6-A9. The court emphasized its earlier reasoning that the fiduciary liability provisions in Section 409(a) of ERISA, 29 U.S.C. 1109(a) (App., *infra*, 1a), impose liability on fiduciaries only, and that "nothing in the statute provides any support for holding others liable under that section." Pet. App. A7.

The court rejected the argument that the Omnibus Budget Reconciliation Act of 1989 (OBRA), Pub. L. No. 101-239, § 2101, 103 Stat. 2123, demonstrates that Section 502(a) authorizes a remedy against nonfiduciaries for knowing participation in a breach of fiduciary duty. Pet. App. A8. OBRA amended ERISA to add Section 502(*l*), 29 U.S.C. 1132(*l*) (Supp. II 1990) (App., *infra*, 2a-3a), which authorizes the Secretary of Labor to assess a civil penalty against fiduciaries and "other person[s]" for a breach of fiduciary duty under ERISA or "knowing participation" in such a breach. The penalty under Section 502(*l*), moreover, is based on amounts recovered by the Secretary in civil actions brought under specified subsections of Section 502(a). The court acknowledged that some of the relevant provisions of Section 502(a) authorize not only the Secretary but also plan participants to bring civil actions. But it rejected petitioners' argument that the relationship between Sections 502(*l*) and 502(a) demonstrates that Congress implicitly intended to authorize participants to sue nonfiduciaries under Section 502(a). Rather, the court held that Section 502(*l*) "applies to the Secretary only, not to plan participants." The court also noted that in enacting OBRA, Congress considered, but did not adopt, an amendment that would have overturned the result in *Nieto*. Pet. App. A8-A9.

[6] Although the court of appeals affirmed the dismissal of petitioner's ERISA-based claims, it reversed the trial court's ruling that a pendent state law professional negligence claim was time-barred. Pet. App. A11.

Petitioners filed a petition for rehearing with a suggestion of rehearing en banc, urging the Ninth Circuit to overrule *Nieto*.[7] The court of appeals, however, denied further review. Pet. App. A15-A16.

DISCUSSION

In our view, the court of appeals erred in holding that ERISA does not authorize a cause of action for monetary relief against a nonfiduciary who knowingly participates in a breach of fiduciary duty. Section 502(a)(3) authorizes civil actions to redress violations of ERISA's fiduciary requirements, and that section is not limited by its terms to actions against fiduciaries. Although ERISA does not define the precise scope of relief available against nonfiduciaries under Section 502(a)(3), this Court's precedents establish that Congress authorized courts to define those limits through the development of federal common law. Under traditional trust rules—which serve as guiding principles for the adoption of common law rules under ERISA—a nonfiduciary is accountable for losses resulting from knowing participation in a breach of fiduciary duty. Further, Congress's recent enactment of Section 502(*l*) confirms that Congress did not intend to abolish breach of fiduciary duty actions against nonfiduciaries when it adopted ERISA, and that instead, Section 502(a)(3) was drafted broadly to authorize federal courts to provide such relief.

This question has nevertheless been the subject of a persistent and widening conflict among the circuits. It is an issue of substantial importance to the proper enforcement of ERISA, and we accordingly believe that further review is warranted.

[7] The Secretary of Labor filed a brief *amicus curiae* in support of that petition. See Pet. App. A14.

1. ERISA codifies a series of fiduciary responsibilities, obligations, and duties relating to the administration of employee benefit plans. See, *e.g.*, 29 U.S.C. 1104 (enumerating fiduciary duties), 1106 (specifying prohibited transactions), 1112 (imposing bonding requirements on fiduciaries).[8] Section 409 of ERISA, 29 U.S.C. 1109, moreover, specifies remedies against a fiduciary who breaches ERISA-imposed duties. First, a fiduciary is "personally liable to make good to [the] plan any losses * * * resulting from each * * * breach" of fiduciary duty. 29 U.S.C. 1109(a). Second, a court may order a breaching fiduciary to "restore to [the] plan any profits of such fiduciary which have been made through use of assets of the plan." *Ibid.* Third, a court may remove a fiduciary to remedy a breach of his duties under ERISA. *Ibid.* In addition, Section 409 generally provides that a fiduciary shall be subject to "such other equitable or remedial relief as the court may deem appropriate." *Ibid.*

Because Section 409 authorizes remedies for breaches of fiduciary duty and names only fiduciaries as potential defendants, the Ninth Circuit concluded that ERISA does not authorize a cause of action against a nonfiduciary for losses arising from a breach of fiduciary duty. See Pet. App. A7; *Nieto*, 845 F.2d at 870-873. The Ninth Circuit, however, placed far too much weight on Section 409's failure to address the liability of nonfiduciaries and far too little weight on the express remedial language of Section 502(a)(3). Section 409 "is simply one section among many that impose liability on those who violate [ERISA's] substantive provisions," *Nieto*, 845 F.2d at 875 (Wiggins, J., concurring).[9] In contrast, Section 502(a)(3), 29 U.S.C. 1132(a)(3), authorizes suit "by a participant" to obtain "appropriate equitable relief" "to redress" violations of or "to enforce" any provision of ERISA's "employee benefit rights" subchapter or the "terms of the plan." An action by a "participant" against a nonfiduciary for participation in a breach of fiduciary duty certainly represents an action to "redress" violations of and "enforce" the provisions of the relevant subchapter that concern fiduciary responsibility. Section 502(a)(3), unlike Section 409, does not restrict its scope to a class of defendants limited to fiduciaries.[10] See *Nieto*, 845 F.2d at 874. Thus, there should be no question that Section 502(a)(3) authorizes "appropriate equitable relief" against a nonfiduciary who knowingly participates in such violations. Contrary to the decision below, Pet. App. A7-A8, we believe that under federal common law, "appropriate equitable relief" should encompass a right to recover plan losses from a nonfiduciary who knowingly participates in a breach of fiduciary duty.

2. a. The scope of "appropriate equitable relief" under ERISA is necessarily determined by reference to federal common law. As this Court has explained, "ERISA abounds with the language and terminology of trust law." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989). Accordingly, ERISA authorizes courts "to develop a 'federal common law of rights and obligations under ERISA-regulated plans,' " *ibid.*, and courts are therefore to consult traditional principles of trust law in deriving federal common law under ERISA, see, *e.g.*, *id.* at 111-115; *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

[8] In general, "the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest. Those duties are described in Part 4 of Title 1 of the Act, which is entitled 'FIDUCIARY RESPONSIBILITY,' see §§ 401-414, * * * 29 U.S.C. §§ 1101-1114." *Massachusetts Mutual Life Insur. Co.* v. *Russell*, 473 U.S. 134, 142-143 (1985) (footnote omitted).

[9] The fact that Section 409 does not mention remedies against nonfiduciaries is not surprising. That section is contained in Part IV, which defines the obligations of "fiduciaries" under ERISA.

[10] Indeed, in *Nieto*, the court determined (845 F.2d at 873-874) that relief is available under Section 502(a)(3) against nonfiduciaries who engage in prohibited transactions under Section 406, 29 U.S.C. 1106.

This Court has already determined, moreover, that ERISA's authorization to develop federal common law extends to the remedial provisions set forth in Section 502(a). In *Firestone*, the Court considered the proper scope of judicial review for challenges to a plan's denial of benefits in suits under Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B). Even though ERISA contains "a panoply of remedial devices" and is "a comprehensive and reticulated statute," the Court concluded that Congress had not addressed all issues arising under that remedial scheme, but had instead delegated common law authority to the judiciary to answer unresolved questions. 489 U.S. at 108-109. The Court examined established principles of trust law and exercised its authority to create a federal common law rule defining the scope of the remedy under ERISA. *Firestone*, 489 U.S. at 111-115.

There are persuasive reasons to construe the federal common law of trusts as authorizing a remedy against a nonfiduciary for losses arising from its knowing participation in a breach of fiduciary duty. First, "established principles of trust law," *Firestone*, 489 U.S. at 115, and "the common law of trusts," *Central States*, 472 U.S. at 570, provide that a knowing participant in a breach of fiduciary duty—even if not a fiduciary—may be held liable for losses sustained by beneficiaries as a result of the breach. See, *e.g.*, G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 901 (rev. 2d ed. 1982); 4 A. Scott & W. Fratcher, *The Law of Trusts* §§ 326-326.6 (4th ed. 1989); Restatement (Second) of Trusts § 326 (1959).[11] In addition, where a trustee's agent knowingly participates and assists in a breach of fiduciary duty, the agent may be liable for losses arising from the breach. See, *e.g.*, 4 A. Scott & W. Fratcher, *supra*, § 326.4; Restatement (Second) of Trusts, *supra*, § 326 cmt. a. An action such as that brought by petitioners here—against an actuary alleged to have knowingly participated in a

[11] This Court has repeatedly consulted the sources cited in the text in fashioning federal common law rules under ERISA. See, *e.g.*, *Firestone*, 489 U.S. at 111-112, 115; *Central States*, 472 U.S. at 570 n.11.

breach of fiduciary duty while acting as the fiduciary's agent—would be cognizable as an equitable action under traditional principles of trust law.[12]

[12] Respondent suggests that the make-whole relief requested by petitioners constitutes a "damage[s]" remedy not cognizable in equity. Br. in Opp. 8-9. That contention, however, misapprehends the nature of actions for breach of trust. "Trusts are, and have been since they were first enforced, the peculiar province of courts of equity." 3 A. Scott & W. Fratcher, *supra*, § 197, at 188; see *Lessee of Smith* v. *McCann*, 65 U.S. (24 How.) 398, 407 (1861) (equity has "exclusive jurisdiction of trusts and trust estates"). Thus, although a beneficiary's action to recover losses resulting from a breach of duty may superficially resemble an action at law for damages, such relief has traditionally been obtained in courts of equity. See, *e.g.*, 3 A. Scott & W. Fratcher, *supra*, §§ 199.3, 205; Restatement (Second) of Trusts, *supra*, §§ 199, 205; 4 J. Pomeroy, *A Treatise on Equity Jurisprudence* § 1080 (S. Symons 5th ed. 1941). When a nonfiduciary knowingly participates in a breach of fiduciary duty, his liability for the trust's losses typically also arises from the duties imposed by equity upon the breaching trustee. See, *e.g.*, *Strauss* v. *United States Fidelity & Guaranty Co.*, 63 F.2d 174, 178 (4th Cir.), cert. denied, 289 U.S. 747 (1933); *Safe Deposit & Trust Co.* v. *Cahn*, 62 A. 819, 822 (Md. 1906); see also, *e.g.*, G. Bogert & G. Bogert, *supra*, § 901, at 257 (rights against nonfiduciary derive from beneficiary's status "as equitable owner of the trust res"). Accordingly, "[a]nyone who participates with a trustee in a breach of trust may be held liable in a court of equity to the *cestui que trust*. * * * [I]f he has never received or no longer holds the trust property or its proceeds, he may be held liable in equity for damages." Scott, *Participation in a Breach of Trust*, 34 Harv. L. Rev. 454, 454 (1921).

Indeed, in *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478 (1990), this Court made clear that "appropriate equitable relief" under Section 502(a)(3) includes make-whole relief. In that case, a plan participant sued in state court, alleging that he had been discharged from employment to prevent his ERISA-covered pension from vesting. Among the relief requested was compensatory damages. 111 S. Ct. at 481. This Court concluded that the participant's state-court cause of action was preempted "because it conflicts directly with an ERISA cause of action." *Id.* at 485. In particular, the Court noted (1) that Section 510 of ERISA, 29 U.S.C. 1140, protects participants from being dismissed in order to prevent the vesting of their pensions, (2) that Section 502(a)(3) authorizes a cause of action for violations of that provision, and (3) that Section 502(e), 29 U.S.C. 1132(e), gives federal courts exclusive jurisdiction over actions brought under Section 502(a)(3). 111 S. Ct. at 485. In so holding,

Second, applying the traditional trust law rule of nonfiduciary liability serves "the policy of the legislation," *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957), which is to "protect * * * the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. 1001(b).[13] This rule would deter and prevent violations of ERISA's fiduciary requirements, and provides greater assurance that ERISA plan participants and beneficiaries will receive full relief for their losses. Indeed, because the common law of trusts recognized a remedy against nonfiduciaries for their participation in breaches of fiduciary duty, see pp. 8-9, *supra*, and any such claim is now preempted to the extent that it "relates to an[] employee benefit plan" covered by ERISA, 29 U.S.C. 1144(a); see, *e.g.*, *Gibson* v. *Prudential Insurance Co. of America*, 915 F.2d 414, 418 (9th Cir. 1990), the Ninth Circuit's narrow reading of Section 502(a)(3) would afford participants in employee benefit plans *less* protection than they had before ERISA was enacted. This Court, however, has previously rejected an interpretation of Section 502(a) that "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone*, 489 U.S. at 114.

b. The recent enactment of Section 502(*l*) of ERISA, 29 U.S.C. 1132(*l*) (Supp. II 1990), further confirms that "appropriate equitable relief" under ERISA includes monetary relief against nonfiduciaries who knowingly participate in breaches of fiduciary duty. Section 502(*l*)(1) provides in relevant part:

this Court rejected the argument that the action was not covered by Section 502(a) because the plaintiff did not seek benefits; rather, the Court made clear that "the relief requested here"—which included compensatory relief—"is well within the power of federal courts to provide" under ERISA. 111 S. Ct. at 486.

[13] See also 120 Cong. Rec. 29,932 (1974) (remarks of Sen. Williams) (statute's objectives "are to make applicable the law of trusts; * * * to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust").

> In the case of—
>
> (A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or
>
> (B) *any knowing participation in such a breach or violation by any other person*,
>
> the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of *the applicable recovery amount*.

29 U.S.C. 1132(*l*)(1) (Supp. II 1990) (emphasis added). Section 502(*l*)(2), in turn, defines the term "applicable recovery amount" to include "any amount * * * ordered by a court to be paid by such fiduciary *or other person* to a plan or its participants and beneficiaries in a judicial proceeding" instituted by the Secretary under Sections 502(a)(2) or (a)(5) of ERISA. 29 U.S.C. 1132(*l*)(2) (Supp. II 1990) (emphasis added).

The provisions of Section 502(*l*)(1) and (2) do not make sense unless Section 502(a)(5)—which authorizes the Secretary to seek "appropriate equitable relief" to redress violations of and enforce ERISA's employee benefit rights provisions—authorizes monetary relief against nonfiduciaries for knowingly participating in breaches of ERISA's fiduciary requirements.[14] It fol-

[14] The first cross-referenced provision of Section 502(a)—subsection (a)(2)—is exclusively the enforcement mechanism for Section 409. Because Section 409 authorizes relief only against fiduciaries, Section 502(a)(2)'s authority is also limited to that type of relief. Cf. *Massachusetts Mutual Life Insur. Co.* v. *Russell*, 473 U.S. 134, 139-140 (1985). Thus, Congress's evident contemplation of an "applicable recovery amount" against "other persons" (*i.e.*, nonfiduciaries) under Section 502(*l*) necessarily reflects its understanding that "appropriate equitable relief" under the second cross-referenced provision of Section 502(a)—subsection (a)(5)—encompasses monetary claims against nonfiduciaries who knowingly participate in breaches of ERISA's fiduciary requirements. Otherwise, there would be no "recovery amount" upon which to base a civil fine for the "knowing participation" of "other person[s]" in fiduciary breaches under Section 502(*l*)(1)(B).

lows, therefore, that Section 502(a)(3) does so as well, because that Section gives a "participant, beneficiary, or fiduciary" authority—identical to the Secretary's authority under Section 502(a)(5)—to seek "appropriate equitable relief" to redress violations of and enforce ERISA's employee benefit rights provisions, which include the statute's fiduciary responsibility requirements. It is a "basic canon of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992); accord *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990) (same), and there is no reason to assume that Congress intended to provide the Secretary greater authority to request relief under Section 502(a)(5) than it gave private parties under Section 502(a)(3). See H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973) (ERISA's remedial provisions were "designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act"). Thus, both subsections should be interpreted to allow monetary relief against nonfiduciaries for knowing participation in breaches of fiduciary duty.[15]

[15] Although Congress enacted Section 502(*l*) as part of OBRA, the court of appeals concluded (Pet. App. A9) that OBRA supports the holding of *Nieto*, because Congress considered but did not enact an amendment to ERISA that would have explicitly authorized claims against persons who knowingly participate in fiduciary breaches. See H.R. 3299, 101st Cong., 1st Sess. § 3151(e)(6) (1989); 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). Such congressional inaction, however, "lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States* v. *Wise*, 370 U.S. 405, 411 (1962)). In the circumstances surrounding enactment of OBRA, the most plausible inference is that Congress failed to act because ERISA already authorized the relief at issue. The House Report accompanying OBRA noted that, at the time of the proposed amendment, "[a]ll but one of the Circuit Courts of Appeal that ha[d] considered the issue ha[d] held that the broad remedial powers conferred on federal courts under ERISA section 502(a)(3) and (5) create an implied cause of action against non-fiduciaries who knowingly participate in breaches of fiduciary duty proscribed by ERISA." H.R. Rep. No. 247, 101st Cong., 1st Sess. 77 (1989). The Ninth Circuit alone had held to the contrary. *Ibid.* In our view, it is implausible to infer that Congress's decision not to enact the proposed amendment reflects acquiescence in what was acknowledged to be the distinctly minority view of the statute. In addition, the amendment was proposed to "clarify[]" the existence of a right of action against nonfiduciaries. *Ibid.* That action was ultimately unnecessary because OBRA amended ERISA to add Section 502(*l*), which itself clarified that Sections 502(a)(3) and (a)(5) authorize claims for monetary relief against nonfiduciaries who knowingly participate in breaches of fiduciary duty.

3. This interpretation of ERISA is also consistent with *Massachusetts Mutual Life Insur. Co.* v. *Russell*, 473 U.S. 134 (1985), relied upon by the Ninth Circuit to support its contrary conclusion in *Nieto*, 845 F.2d at 872. In *Russell*, a beneficiary sued a plan fiduciary for bad-faith processing of her claim for benefits, asserting a right to recover compensatory and punitive damages that were not available under the terms of the plan. But Section 502(a)(1)(B) expressly authorizes a beneficiary who has wrongfully been denied benefits to bring a claim "to recover benefits due to him *under the terms of his plan*." 29 U.S.C. 1132(a)(1)(B) (emphasis added). The claim asserted by the beneficiary therefore exceeded the congressional description of the beneficiaries' remedy (473 U.S. at 144), and the Court in *Russell* was asked to decide whether the apparent limitations on the remedy set forth in that Section could be avoided by permitting the claim to proceed under Section 502(a)(2), 29 U.S.C. 1132(a)(2), which permits a beneficiary to sue a fiduciary for a breach of fiduciary duty under Section 409.

The Court declined to read Section 409 as enlarging the beneficiary's "explicitly authoriz[ed]" (473 U.S. at 144) right to recovery for wrongful denial of benefits. Instead, the Court interpreted Section 409—which provides that a fiduciary "with respect to [an ERISA] plan" is personally liable to "make good to such plan any losses to the plan" resulting from a breach of the fiduciary's duties—to require that damages under Section 409 "inure[] to

the benefit of the plan as a whole." *Russell*, 473 U.S. at 140. Although Section 409 authorizes a court to award "such other equitable or remedial relief as the court may deem appropriate," 29 U.S.C. 1109(a), the Court found that this language only authorized " 'plan-related' relief," and not a beneficiary's suit for extracontractual damages on her own account. 473 U.S. at 142.

In contrast to petitioners here, the beneficiary in *Russell* sued exclusively under Section 409 and placed no reliance on Section 502(a)(3). The Court accordingly reserved the question whether a beneficiary has a cause of action for extracontractual damages under the broad terms of the latter section. 473 U.S. at 139 n.5. The Court's determination that the unenumerated relief was unavailable in that case therefore cannot be understood to mean that a federal common law cause of action is unavailable under Section 502(a)(3) if the requested relief is not also expressly authorized under a more specific provision of ERISA, such as Section 409.

Indeed, such a broad reading of *Russell* would render Section 502(a)(3) a nullity, contrary to the well-settled principle that a statute should be construed, if possible, to give effect to all of its provisions. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979).[16] It would also

[16] We disagree with the Ninth Circuit's conclusion (*Nieto*, 845 F.2d at 873) that recognizing a federal common law right to make-whole relief for breaches of fiduciary duty under Section 502(a)(3) would render the specific provisions of Section 409 superfluous. As discussed, see p. 6, *supra*, Section 409 not only provides general authority to award appropriate relief against a fiduciary who breaches his duties under ERISA, but also provides that a fiduciary shall be subject to certain very definite remedies for breaching the duties imposed under ERISA—specifically, make-whole relief for the plan, disgorgement of profits earned in breach of trust, and removal of a fiduciary. 29 U.S.C. 1109(a). Even if Section 502(a)(3) authorizes courts to derive the same remedies as a matter of federal common law, the enumeration of certain remedies in Section 409 is not superfluous, because it ensures that the specified relief will be available irrespective of how federal common law under ERISA may evolve. In effect, therefore, Section 409 places a floor under the types of relief available from a fiduciary.

be inconsistent with the overall structure of Section 502(a), which "set[s] forth a comprehensive civil enforcement scheme," *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 485 (1990), that complements several specific provisions—such as the subsections of Section 502(a) at issue in *Russell*—with two more general provisions, Sections 502(a)(3) and (a)(5), that broadly authorize "appropriate equitable relief * * * to redress violations" of ERISA's employee benefit right provisions.[17]

Further, no section of ERISA explicitly addresses the right of a plan participant or beneficiary to sue nonfiduciaries for knowing participation in a fiduciary breach. Rather, to the extent that ERISA speaks to such a right at all, Section 502(*l*) supplies the unmistakable implication that "appropriate equitable relief" under Sections 502(a)(3) and (a)(5) encompasses a cause of action for monetary relief against nonfiduciaries who knowingly participate in breaches of fiduciary duty under ERISA. Because the only question left unanswered is the scope of available relief, this case is controlled not by *Russell*, but by *Firestone*—which requires resort to a federal common law of trusts where Congress has not explicitly addressed a remedial issue.

4. a. The question whether ERISA recognizes a cause of action for a nonfiduciary's knowing participation in a fiduciary breach is the subject of persistent and growing conflict among the circuits. Contrary to the Ninth Circuit, several other courts of appeals have recognized the general principle that a nonfiduciary may be liable under ERISA for knowing participation in a breach of fiduciary duty. See *Whitfield* v. *Lindemann*, 853 F.2d 1298, 1303 (5th Cir. 1988), cert. denied, 490 U.S. 1089 (1989); *Brock* v. *Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Lowen* v. *Tower Asset Management, Inc.*, 829 F.2d 1209, 1220-1221 (2d Cir. 1987); *Thornton* v. *Evans*, 692 F.2d

[17] As we have shown, because traditional trust law authorizes an equitable claim for make-whole relief from a nonfiduciary who has knowingly participated in a breach of fiduciary duty, the plain language of Section 502(a)(3) readily accommodates petitioners' claims in this case.

1064, 1078 (7th Cir. 1982); see also *Fink* v. *National Savings & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985) (dictum). In addition, the Eleventh Circuit in *Useden* v. *Acker*, 947 F.2d 1563, 1582 (1991), petition for cert. pending, No. 91-1944 (filed June 1, 1992), recently joined the Ninth Circuit in holding that ERISA creates no remedy analogous to damages against a nonfiduciary who knowingly participates in a breach of fiduciary duty.[18] The conflict among the circuits, moreover, has been noted by a number of courts. See, *e.g.*, *Useden*, 947 F.2d at 1579-1580; *Diduck* v. *Kaszycki & Sons Contractors, Inc.*, 737 F. Supp. 792, 804 (S.D.N.Y. 1990); *Dole* v. *Compton*, 753 F. Supp. 563, 567-568 (E.D. Pa. 1990); *Pension Fund-Mid Jersey Trucking Industry Local-701* v. *Omni Funding Group*, 731 F. Supp. 161, 176-177 (D.N.J. 1990); see also *Nieto*, 845 F.2d at 874 (Wiggins, J., concurring).

b. Respondent argues that the contrary decisions either predate or do not address this Court's decision in *Russell*, and that if reconsidered in light of *Russell*, the re-

[18] In our view, the decision in this case presents a better vehicle for reviewing the issue than does *Useden*. The court of appeals in this case, unlike the court in *Useden*, gave full consideration to the effect of OBRA on the issue presented. In addition, the Ninth Circuit has refused to apply the federal common law to determine available relief against a nonfiduciary, making the law of that circuit broader than the ruling in *Useden*, which merely held that federal common law under ERISA does not include an equitable cause of action analogous to money damages. In addition, the district court in *Useden* held in the alternative that "even if there is a cause of action for non-fiduciary liability * * * the record is devoid of evidence indicating that [respondents in that case] knowingly participated in any breach of fiduciary duty owed by the plan fiduciaries." *Useden* v. *Acker*, 721 F. Supp. 1233, 1244-1245 (S.D. Fla. 1989). In affirming the trial court's decision on the ground that money damages are unavailable against a nonfiduciary under Section 502(a)(3), the Eleventh Circuit did not address the district court's alternative holding. Thus, petitioners in *Useden* may not obtain relief even if the judgment of the court of appeals is reversed. We therefore believe that this Court should grant the petition in the present case and hold *Useden* pending the disposition of that petition.

sult in those cases would be different. Br. in Opp. 9-10. *Russell*, however, did not address the scope of Section 502(a)(3) or the availability of remedies against nonfiduciaries and, as noted, see pp. 13-15, *supra*, its reasoning does not undermine the decisions that have recognized the remedy sought by petitioners.[19] Similarly unpersuasive is respondent's argument (Br. in Opp. 5) that there is no conflict because the courts that have recognized a right of action all did so prior to OBRA's enactment in 1989. As we have previously shown, see pp. 10-12, *supra*, OBRA confirms that ERISA authorizes a right of action against nonfiduciaries who knowingly participate in breaches of fiduciary duty. Thus, it is hardly to be expected that the courts of appeals that have recognized such a right will revisit the issue in light of OBRA. What is significant, however, is that the Ninth Circuit in this case explicitly considered the effect of OBRA, it nevertheless adhered to its decision in *Nieto*, and the court declined the suggestion of petitioners and the United States to hear the case en banc. Accordingly, it is clear that the Ninth Circuit will not recede from its minority position based on the enactment of Section 502(*l*) in OBRA, and the conflict in authority will likely persist.[20]

c. Respondent also asserts a variety of case-specific distinctions that do not negate the fact that there is a conflict among the circuits. First, respondent seeks to distinguish *Whitfield* and *Hendershott* on the ground that those actions were brought by the Secretary of Labor, not

[19] In addition, *Whitfield*, *Hendershott*, *Lowen*, and *Fink* were all decided after *Russell*, and the court in *Lowen* was aware of *Russell* when it embraced nonfiduciary liability (although it did not discuss *Russell* in that context). See *Lowen*, 829 F.2d at 1213.

[20] In addition, although the court did not consider OBRA, the Eleventh Circuit decided *Useden* following enactment of OBRA. Because that court held that ERISA recognizes no damage remedy against nonfiduciaries under Sections 502(a)(3) and (a)(5), 947 F.2d at 1581-1582, the conflict among the circuits is, in fact, widening—despite OBRA's clear implication that a right of action against nonfiduciaries is authorized by ERISA.

a plan beneficiary or participant. Br. in Opp. 14-15 & n.15. But as discussed, see p. 12, *supra*, Sections 502(a)(3) and (a)(5) codify identical rights to seek "appropriate equitable relief" to redress violations of ERISA's employee benefit rights provisions, and there is no reason to think that Congress intended to distinguish the kinds of relief available under the identical phrasing of the relevant provisions of those subsections. In any case, other conflicting decisions—such as *Lowen* and *Thornton*—were brought by private parties, and not the Secretary.

Second, respondent argues that *Hendershott* is not in conflict with the decision here because the requested relief—restitution of illegally obtained profits—is equitable in nature. Br. in Opp. 14-15. That purported distinction, however, ignores the fact that under traditional trust law, a remedy calculated to make the trust whole for losses arising from a fiduciary breach also arises in equity. See note 12, *supra*. Other decisions, moreover, have recognized nonfiduciary liability for monetary relief calculated to make an ERISA-covered plan whole. See, *e.g.*, *Whitfield*, 853 F.2d at 1302-1303; *Lowen*, 829 F.2d at 1212, 1220.

Third, respondent claims that the Second Circuit's decision in *Lowen* is consistent with Ninth Circuit precedent because the breach of fiduciary duty at issue in *Lowen* arose from party-in-interest transactions (829 F.2d at 1213-1218),[21] in violation of Section 406, 29 U.S.C. 1106,[22] and *Nieto* recognized a right to sue nonfiduciary parties in interest under Section 502(a)(3). See Br. in Opp. 15-16. It is true that the narrow holdings of *Lowen* and *Nieto* are consistent, but *Lowen* stands in contrast with *Nieto* to the extent that it broadly embraced "the principle that parties who knowingly participate in fiduciary breaches may be liable under ERISA to the same extent as the fiduciaries." 829 F.2d at 1220. In any event, other decisions have recognized nonfiduciary liability in contexts other than prohibited transactions. See, *e.g.*, *Whitfield*, 853 F.2d at 1302-1303 (nonfiduciary attorney liable for the losses arising from knowing participation in plan trustee's acceptance of overvalued assets); *Thornton*, 692 F.2d at 1077-1078 (conversion of plan's funds).[23]

d. The issue of nonfiduciary liability under ERISA is of great importance to the enforcement of fiduciary requirements imposed by the statute. The Secretary of Labor has filed numerous actions against nonfiduciaries, seeking to compensate an employee benefit plan for losses resulting from a fiduciary breach in which a nonfiduciary knowingly participated. See, *e.g.*, *Whitfield* v. *Lindemann*, *supra*; *Dole* v. *Compton*, 753 F. Supp. 563, 564-565 (E.D. Pa. 1990); *Brock* v. *Gerace*, 635 F. Supp. 563 (D.N.J. 1986). Because there can be no assurance that fiduciaries will be able to provide complete relief to an ERISA-covered plan, see, *e.g.*, *Brock* v. *Gerace*, 635 F. Supp. at 569, recognition of nonfiduciary liability may in some circumstances provide the only means of making a plan whole. Accordingly, in view of the conflict among the circuits and the recurring nature of the question presented, further review of this important question is warranted.[24]

[21] *Hendershott* also arose from a party-in-interest transaction, although the court of appeals never addressed whether the nonfiduciary was himself a party in interest. See 840 F.2d at 342-343.

[22] Section 406, 29 U.S.C. 1106, prohibits a fiduciary from causing a plan and a party in interest to engage in specified transactions.

[23] Respondent also seeks to draw significance from the fact that the claim against it arose from its role as a service provider, performing statutorily mandated actuarial functions. See Br. in Opp. 15, 18. It is not clear, however, why that fact supports the court of appeals' determination that respondent is not liable for participating in a breach of fiduciary duty. If anything, there is greater reason to conclude that relief under Sections 502(a)(3) and (a)(5) should be broadly available where a nonfiduciary's knowing participation in a breach of fiduciary duty also involves the violation of statutory standards imposed upon the nonfiduciary.

[24] In *Klepak* v. *Dole*, 490 U.S. 1089 (1989) (No. 88-1271), the United States opposed a petition for certiorari presenting the issue raised here. Our opposition was premised in part on the view that

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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the Ninth Circuit, then the only court of appeals to reject nonfiduciary liability, would likely abandon its holding in *Nieto*. For the reasons set forth, see p. 17, *supra*, that is no longer likely to occur.

APPENDIX

ERISA § 409(a), 29 U.S.C. 1109(a), provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

ERISA § 502(a), 29 U.S.C. 1132(a), provides:

> **Persons empowered to bring a civil action**
>
> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of his plan, or to clarify his rights to future benefits under the terms of his plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary, for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

ERISA § 502(*l*), 29 U.S.C. 1132(*l*) (Supp. II 1990), provides:

Civil penalties on violations by fiduciaries.

(1) In the case of (A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or (B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—(A) pursuant to any settlement agreement with the Secretary, or (B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—(A) the fiduciary or other person acted reasonably

and in good faith, or (B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of title 26.

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